



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 13, 1995

Mr. Ramon Dasch
Superfund Coordinator
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR95-1221

Dear Mr. Dasch:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 31209.

The Texas Natural Resource Conservation Commission ("TNRCC") has received a request for "all financial information which Voluntary Purchasing Groups, Inc. and its subsidiaries have provided to TNRCC regarding their ability to perform or fund a cleanup in Commerce." TNRCC asserts that the requested information is excepted from required public disclosure under sections 552.101, 552.103, and 552.110 of the Government Code. Voluntary Purchasing Groups, Inc. ("VPG") has also submitted several briefs regarding the availability of the information.

Section 552.110 protects trade secrets from required public disclosure. The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757 (1939). *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). A trade secret

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern

for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example, the amount or other terms of a secret bid for a contract. . . .* A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management. [Emphasis added.]

RESTATEMENT OF TORTS § 757 cmt. b (1939). The governmental body or the company whose records are at issue must make a *prima facie* case for exception as a trade secret under section 552.110.¹ See Open Records Decision No. 552 (1990) at 5.

VPG contends that the following documents contain trade secrets: October 11, 1994 letter from Bill Turnage, VPG, to Linda Shirck, TNRCC; "VPG's Supplier Credit"; and "How Settlements Affect VPG's Operating Capital."² We conclude that much of the information in the foregoing documents is not a trade secret. The information contained in these pages is not a "process or device for continuous use" in VPG's business that gives VPG an opportunity to obtain an advantage over its competitors. Rather, much of the information concerns "single or ephemeral event[s]" that do not come within the definition of a trade secret. However, we conclude that VPG has established a *prima*

¹ There are six factors listed by the Restatement which should be considered when determining whether information is a trade secret:

- (1) the extent to which the information is known out side of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939).

²VPG also asserts that the following documents contain trade secrets: September 8, 1994 letter from Bill Turnage, VPG, to Barry Williams, TNRCC; VPG's Audited Financial Statement for the year ending 4/30/94; VPG's tax returns for the periods 4/30/92, 4/30/93, and 4/30/94; and letter from VPG's legal counsel containing information about VPG's efforts to collect insurance. These documents were not submitted to this office by TNRCC and we do not rule on their availability.

facie case that the some of the information in the document entitled "VPG's Supplier Credit," constitute trade secrets. We have marked the information that you must withhold pursuant to section 552.110.

We next consider whether any of the remaining information is excepted from required public disclosure under section 552.101 or 552.103.³ We conclude that neither of these exceptions applies. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Neither TNRCC nor VPG has identified any state statute or common-law doctrine, besides trade secret, which might make this information confidential, nor are we aware of any.

Section 552.103 excepts from required public disclosure information relating to litigation "to which the state or political subdivision . . . is or may be a party." Gov't Code § 552.103(a). To secure the protection of this exception, a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990); *see also* Open Records Decision No. 588 (1991) (contested case under APA is litigation for purposes of former section 3(a)(3) exception).

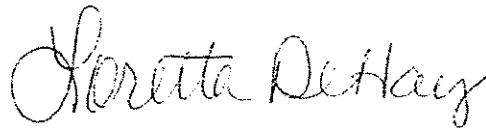
TNRCC fails to identify the particular action or administrative proceeding, or reasonably anticipated action or proceeding, to which the requested information relates. It is apparent from the documents themselves that they relate to settlement negotiations between TNRCC and VPG. When parties to the litigation or anticipated litigation have inspected the requested information, however, section 552.103 may no longer be invoked. Open Records Decision No. 597 (1991). Obviously, VPG has had access to this information. TNRCC has not identified any other parties to the settlement proceedings, or to any other pending or reasonably anticipated litigation or administrative proceeding, from whom it might have an interest in withholding the information. Therefore, we conclude that TNRCC has failed to demonstrated that the records are excepted from required public disclosure under section 552.103.

In summary, TNRCC must withhold the marked information on "VPG's Supplier Credit" under section 552.110. The remaining information must be released.

³Although VPG asserts that the records are excepted under section 552.104, TNRCC has not raised that exception and it is therefore not before us. We further note that section 552.104 is designed to protect the interests of the governmental body, as in a competitive bidding situation for a contract or benefit and does not protect the interests of private parties submitting information to a governmental body. Open Records Decision No. 592 (1991) at 8.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/rho

Ref.: ID# 31209

Enclosures: Marked documents

cc: Ms. Jean M. Flores
Guida, Slavich & Flores
5949 Sherry Lane, Suite 1150
Dallas, Texas 75225
(w/o enclosures)

Mr. Robert Tuchman
Holme, Roberts & Owen
1700 Lincoln, Suite 4100
Denver, Colorado 80203
(w/o enclosures)